JK Makki Properties Sdn Bhd v Eddie Lee Kim Tak & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–1014 OF 2007, W-02–1013 OF 2007 AND W-02–1012 OF 2007
SURIYADI, HELILIAH AND KN SEGARA JJCA
9 OCTOBER 2008

Civil Procedure — Judgments and orders — Drawing up of orders — Winding up order read out in judge's chambers — Chambers declared open court before hand — Whether order tainted or vitiated

Companies and Corporations — Winding up — Opposition to petition — Failure to file affidavit in opposition — Effect of

Companies and Corporations — Winding up — Petition — Affidavit verifying petition — Nature of affidavit — Whether contents of affidavit hearsay

Companies and Corporations — Winding up — Petition — Hearing of — Application for adjournment of petition deferred to following day on hearing of petition — Court instead deciding on petition on following day — Whether clear court decided against adjournment application — Whether proper for winding up order to be read out in judge's chambers — Whether winding up order tainted and vitiated thereby

Companies and Corporations — Winding up — Petition — Registrar's certificate under r 32 of the Companies Rules 1972 — Whether certificate intended to certify petitioner fully complied relevant requirements

The petitioner/respondent had obtained a winding up petition against the appellant to recover a judgment debt. The appellant appealed against the winding up order to the Court of Appeal on three grounds, to wit: (i) it (the appellant) was not given the opportunity to be heard prior to the making of the winding up order; (ii) the petition was not adjourned when it should have been, and (iii) the winding up order was not meted down in open court. The appellant alleged that when the petition came up for hearing on 15 November 2007, the appellant applied for an adjournment on the basis that it had filed an application to stay the winding up petition and other proceedings connected thereto. The petitioner opposed the adjournment application. The appellant

alleged that the judge indicated that she would decide on the adjournment application the next day but the next day, ie 16 November 2007 the judge abruptly decided on the petition instead.

Held, dismissing the appeal with costs:

(1) The adjournment application was indeed made by the appellant's counsel though regretfully it was not recorded in the notes of proceedings. By deciding on the petition on 16 November 2007, the court had decided against the adjournment application. There was nothing to show that the court had not applied its mind on the issue of the adjournment. The notes of proceedings clearly stated that the next day, ie 16 November 2007 was for decision, whether for the adjournment application or the petition (see paras 11–12(a)–(c)).

(2) There was no submission by the appellant that the matter when called up for hearing on 15 November 2007 was not held in open court. The draft order annexed to the appeal record however indicated that the hearing took place in open court (see para 13).

(3) Although the decision on the winding up petition was read out in the judge's chambers, the judge had declared her chambers an open court. Even if the chambers had not been declared an open court, the handing down of the order in the judge's chambers, was a mere irregularity and could not have tainted and vitiated that order. The hearing was dealt with in open court a day earlier, ie on 15 November 2007 and both parties had been accorded the opportunity to ventilate their respective positions. With all the facts before the judge there was thus no necessity to reopen the case on 16 November 2007 (see paras 14–15).

(4) The petition supported by the verifying affidavit was in order. The verifying affidavit constitutes prima facie evidence of the statements in the petition and unless there is evidence to the contrary, the court can take the next step of deciding whether or not to make a winding up order. In the instant appeal, the evidence in the verifying affidavit could not be labelled hearsay, as the respondent who affirmed the verifying affidavit was involved with the preparation of the petition every step of the way. Further, a substantial portion of the statements of the petition related to prior proceedings in the relevant courts, which eventually lead to the instant appeal and were hence factual in nature (see paras 17–18).

(5) Apart from the verifying affidavit, a registrar's certificate had been issued under r 32 of the Companies Winding-Up Rules 1972 ('Rules') certifying that the petitioner had fully complied with the relevant requirements. The petitioner had done everything that was needed to be done. The appellant however had failed to file any affidavit in

opposition, as mandatorily demanded by r 30 of the Rules. Without any opposition facing the petition, the judge was at liberty to assess the whole body of evidence, giving proper weight to it, and decide whether to grant the order or not. In the circumstances of the instant case, any refusal of a winding-up order by the judge would have been totally unacceptable (see paras 19–21).

[Bahasa Malaysia summary

Pempetisyen/responden telah memperoleh petisyen penggulungan terhadap perayu untuk mendapatkan semula hutang penghakiman. Perayu merayu terhadap perintah penggulungan tersebut ke Mahkamah Rayuan atas tiga alasan, iaitu: (i) ia (perayu) tidak diberikan peluang untuk mengemukakan hujahannya sebelum perintah penggulungan dibuat; (ii) petisyen tidak ditangguhkan apabila ia sepatutnya ditangguhkan, dan (iii) perintah penggulungan tersebut tidak dilaksanakan di mahkamah terbuka. Perayu mendakwa bahawa apabila petisyen dipanggil untuk perbicaraan pada 15 November 2007, perayu memohon penangguhan atas dasar bahawa ia telah memfailkan permohonan penangguhan petisyen penggulungan tersebut dan lain-lain prosiding yang berkaitan dengannya. Pempetisyen membantah permohonan penangguhan tersebut. Perayu menyatakan bahawa hakim menyatakan bahawa beliau akan membuat keputusan terhadap permohonan penangguhan pada hari kemudiannya tetapi pada hari tersebut, iaitu 16 November 2007, hakim tiba-tiba membuat keputusan terhadap petisyen.

Diputuskan, menolak rayuan dengan kos:

(1) Permohonan penangguhan sememangnya dibuat oleh peguam perayu walaupun dikesali ia tidak direkodkan di dalam nota prosiding. Dengan memutuskan terhadap petisyen pada 16 November 2007, mahkamah telah membuat keputusan terhadap permohonan penangguhan. Tidak ada apa-apa untuk menunjukkan bahawa mahkamah tidak memberikan tumpuan kepada isu penangguhan. Nota-nota prosiding jelas menyatakan bahawa hari esoknya, iaitu 16 November 2007 adalah untuk pemutusan sama ada untuk permohonan penangguhan atau petisyen (lihat perenggan 11–12(a)–(c)).

(2) Tidak ada hujahan oleh perayu bahawa perkara tersebut apabila dipanggil untuk dibicarakan pada 15 November 2007 tidak diadakan di mahkamah terbuka. Draf perintah yang dikepilkan dengan rekod rayuan walau bagaimanapun menunjukkan bahawa perbicaraan dibuat di mahkamah terbuka (lihat perenggan 13).

(3) Walaupun keputusan bagi petisyen penggulungan telah dibacakan di kamar hakim, hakim telah mengisytiharkan kamarnya sebagai mahkamah terbuka. Walaupun kamar hakim tidak diisytiharkan

sebagai mahkamah terbuka, pemberian perintah di kamar hakim, hanyalah salah aturan semata-mata dan tidak boleh mencacatkan dan membatalkan perintah tersebut. Perbicaraan diadakan di mahkamah terbuka pada hari sebelumnya, iaitu pada 15 November 2007 dan kedua-dua pihak telah diberikan peluang untuk mengemukakan kedudukan masing-masing. Dengan kesemua fakta di hadapan hakim dengan itu tidak ada keperluan untuk membuka semula kes pada 16 November 2007 (lihat perenggan 14–15).

(4) Petisyen tersebut yang disokong oleh afidavit pengesahan adalah teratur. Afidavit pengesahan merupakan keterangan prima facie kenyataan-kenyataan di dalam petisyen dan tanpa keterangan sebaliknya, mahkamah boleh mengambil langkah seterusnya untuk memutuskan sama ada mahu atau tidak membuat perintah penggulungan. Di dalam rayuan ini, keterangan di dalam afidavit pengesahan tidak boleh dikatakan sebagai cakap dengar, kerana responden yang mengesahkan afidavit pengesahan terlibat dengan penyediaan petisyen tersebut secara menyeluruh. Selanjutnya, sebahagian besar kenyataan petisyen tersebut berkaitan dengan prosiding sebelum di mahkamah yang berkaitan, yang pada akhirnya membawa kepada rayuan ini dan oleh itu adalah bersifat faktual (lihat perenggan 17–18).

(5) Selain daripada afidavit pengesahan, sijil pendaftar telah dikeluarkan di bawah k 32 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah') mengesahkan bahawa pempetisyen telah mematuhi secara menyeluruh keperluan yang relevan. Pempetisyen telah membuat segala yang perlu dibuat. Perayu walau bagaimanapun telah gagal memfailkan apa-apa afidavit menentang seperti yang dituntut secara mandatori oleh k 30 Kaedah-Kaedah. Tanpa apa-apa tentangan terhadap petisyen, hakim mempunyai kebebasan untuk menilai keseluruhan keterangan, memberikan pertimbangan yang sewajarnya dan memutuskan sama ada untuk membenarkan perintah atau tidak. Dalam keadaan kes ini, apa-apa penafian untuk perintah penggulungan oleh hakim tidak boleh diterima secara keseluruhannya (lihat perenggan 19–21).]

Notes

For cases on application for adjournment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 186–197.

For cases on drawing up of orders, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4117–4118.

For cases on opposition to petition, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1275–1315.

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1320–1472.

Cases referred to

Bank of Commerce (M) Berhad v Far-East United Industries Sdn Bhd [2000] MLJU 431; [2000] 4 AMR 4694, HC (refd)
Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd [2008] 4 MLJ 400; [2007] 4 CLJ 421, CA (refd)
Gold Hill Mines, Re (1882) 23 Ch D 210, CA (refd)
Koscot Interplanetary (UK) Ltd, Re; Re Koscot AG [1972] 3 All ER 829, Ch D (refd)
New Callao Ltd, Re (1882) 47 LT 175 (refd)
St David's Gold Mining Co, Re (1866) 14 LT 539 (refd)
Travel & Holiday Clubs, Ltd, Re [1967] 2 All ER 606, Ch D (refd)

Legislation referred to

Companies Winding-Up Rules 1972 rr 5, 30, 30(2), 32, 194(1)
Courts of Judicature Act 1964 ss 44, 72
Rules of the High Court 1980 O 14

Appeal from: Winding Up Petition Nos D2–28–896 of 2006, D2–28–895 of 2006 and D2–28–897 of 2006 (High Court, Kuala Lumpur)

Harpal Singh Grewal (S Malar and Jasvinjit Singh with him) (Kiru & Yong) for the appellant.
Yusuf Khan (Lee Chan Leong with him) (Lee Chan Leong & Co) for the respondents.
Lee Poh Chin (Teh Siew Kai) for the liquidator.
Hargopal Singh (Hargopal Singh & Co) for the intervener.

Suriyadi JCA (delivering judgment of the court):

[1] On 16 November 2007, the High Court had granted 'orders in terms' to three related petitions, all filed by the same petitioner ('the respondent'). The respondents of the petitions ('the appellants') being dissatisfied with the orders had filed three separate appeals. The reference numbers of the respective appeals supplied by the Court of Appeal are W-02–1012 of 2007, W-02–1013 of 2007 and W-02–1014 of 2007 ('the substantive appeals'). As there were many similarities in the issues involved, parties had agreed that attention be given to W-02–1014 of 2007 with the eventual decision binding the other two.

[2] Connected to the substantive three appeals were other related appeals and they were W-02–591 of 2007, W-02–592 of 2007, W-02–595 of 2007, W-02–1179 of 2007, W-02–1180 of 2007, W-02–1181 of 2007, W-02–763 of 2008, W-02–764 of 2008 and W-02–766 of 2008.

[3] There was also a notice of motion (encl 23a) before us, filed by the appellant on 13 August 2008 for an order that the proceeds pursuant to a sale

and purchase agreement between LTS Resources Holdings (M) Sdn Bhd and the appellant dated 28 July 2005, be paid into court pursuant to s 44 of the Courts of Judicature Act 1964 pending the disposal of the substantive appeals. In the event the said proceeds have been paid to the provisional liquidator, then alternatively, he is directed to pay the said proceeds into court also pursuant to s 44 of the Courts of Judicature Act pending the disposal of the substantive appeals.

[4] Apart from the above enclosure, there was also another notice of motion (encl 30a) filed by LTS Resources Holdings Sdn Bhd on 15 September 2008 for an order that leave be granted to the applicant to intervene in encl 23(a)'s proceedings and it be given leave to file a further affidavit.

[5] The background facts and the antecedent of this appeal ie W-02–1014 of 2007 are as follows.

[6] On 2 September 1998 the respondent had successfully obtained an O 14 summary judgment against the appellant in Shah Alam High Court Civil Suit No MT1–22–785 of 1998 (later Kuala Lumpur High Court Civil Suit No S-22–682 of 1998) for the sum of RM18,308,435.54. The appellant being dissatisfied had appealed to the Court of Appeal. The Court of Appeal allowed the appeal but its order was overturned by the Federal Court; and the O 14 summary judgment was affirmed. Consequent thereto, the respondent successfully recovered and obtained from the appellant payment of RM1,867,873.13. As complete payment was not made, the respondent filed Winding Up Petition No D2–28–896 of 2006 in the High Court at Kuala Lumpur, against the appellant. As said above, the High Court judge had allowed the respondent's petition.

[7] When the appeal was brought before us, learned counsel for the appellant had focused his arguments on three grounds, namely that it was not given the opportunity to be heard prior to the winding up order, the petition was not adjourned when it should have been, and that the winding up order must be set aside as it was not meted down in open court.

[8] At the end of the hearing we dismissed this appeal with costs. The order of the High Court was affirmed and the deposit was ordered to account of taxed costs. As agreed by parties, as the order of this appeal would affect the other two substantive appeals, we accordingly also dismissed them and made similar consequential orders. The connected and related appeals of W-02–591 of 2007, W-02–592 of 2007, W-02–595 of 2007, W-02–1179 of 2007, W-02–1180 of 2007, W-02–1181 of 2007, W-02–763 of 2008, W-02–764 of

2008 and W-02–766 of 2008 were dismissed with costs. The orders of the High Court pertaining to the connected appeals were affirmed and the deposits ordered to account of taxed costs.

[9] Learned counsel for the appellant and the intervener thereafter withdrew encls 23a and 30a and we had accordingly struck them out but made no order as to costs. We now give the reasons for not allowing this appeal.

ISSUE OF ADJOURNMENT

[10] Before us, the appellant had ventilated that on the hearing date ie 15 November 2007 before the High Court judge, it had applied for an adjournment of the matter. Even though the notes of proceedings and grounds of judgment of the learned judge are silent as to the adjournment application, it was not denied by the respondent that indeed there was an application, but made after submission of the petition had taken place. According to the appellant's written submission, an oral application was registered before the learned judge to have the matter adjourned to another date until a matter before the Court of Appeal was disposed of. The learned judge was alleged to have indicated that she would decide on the adjournment application the next day hence the postponement. The next day, instead of deciding on the issue of the adjournment, the learned judge had abruptly decided on the petition. The respondent though did not deny this adjournment application, had canvassed that the reason for this adjournment request was that the appellant had filed an application for stay of the winding up action and all other proceedings connected thereto at the Court of Appeal, on an urgent basis. The respondent, needless to say, had opposed this adjournment application.

[11] A scrutiny of the notes of proceedings of the learned judge reveals that there was a submission pertaining to the petition, followed by an 'OIT' order, premised on the ground that there was no affidavit in opposition before her. The notes too confirmed that the appellant had submitted that a stay application filed together with a certificate of urgency was pending at the Court of Appeal. The appellant further said, 'If this is carried on the integrity of the motion is academic'. The latter statement would not have been uttered unless it was connected to an adjournment application. By deduction we were satisfied that it was at this juncture that the adjournment application was made though regretfully not recorded. The submission of learned counsel for the respondent thus was corroborated in every material point.

[12] At the end of the day it was our finding of fact that:

(a) even if the court had adjourned the case to the next day on the pretext of wanting to mull over it ie whether to grant an adjournment or not,

by so deciding on the petition *it thus had decided against it*. In a word it already had applied its discretion;

(b) there was nothing before us to establish that the court had not applied its mind on the issue of the adjournment; and

(c) the notes of proceedings clearly stated that the next day was for decision, be it for the adjournment application or the petition application.

WHETHER A HEARING TOOK PLACE ON 15 NOVEMBER 2007 IN OPEN COURT

[13] To give a reasoned answer to this issue it is necessary that I peruse the notes of proceedings in order to have a better picture of things. There was no submission by the appellant that the matter when called up for hearing on that date was not held in open court. That being so I have to assume that procedurally everything was done regularly and that it was indeed heard in open court as statutorily required under r 5 of the Companies Rules. Evidentially the draft order at p 2 of the record of appeal even indicated that the hearing took place in open court.

WAS THE WINDING UP ORDER METED DOWN IN OPEN COURT OR NOT ON 16 NOVEMBER 2007

[14] Before us Encik Yusof Khan, counsel for the respondent had clarified that the learned judge, even though had read the decision in chambers, had from the outset declared that her chambers was an open court. He further ventilated that Miss S Malar counsel for the appellant was also present that day. She was challenged by the respondent's counsel to confirm that alleged declaration but counsel regretfully had preferred to remain silent. From the submissions of both parties, compounded by the silence of the appellant's counsel to deny the learned judge's declaration, we were satisfied that the chambers had been declared an open court.

[15] Even if we had erred on the above finding, the handing down of the order in the learned judge's chambers, was a mere irregularity and could not have tainted and vitiate that order. The hearing was dealt with in open court a day earlier and both parties had been accorded the opportunity to ventilate their respective positions. With all the facts before her there was thus no necessity to reopen the case on 16 November 2007. What was left was the meting down of the relevant order.

[16] Can it be said that judges' orders or judgments become tainted just because they are read out by registrars of the High Courts, Court of Appeal or

the Federal Court? Certainly not. Can it be categorically asserted that the impugned winding up order became tainted or substantial injustice was caused just because it was read out in a smaller room (r 194(1) of the Companies Winding-Up Rules 1972; s 72 of the Courts of Judicature Act 1964)? Again certainly not. It is no secret that counsel do occasionally make special requests to have open court cases be heard in chambers, on account of their sensitivity eg infants are involved or due to some acceptable reason. I rue the day when a court will reject without more any application by litigants or their respective counsel in certain 'mandatory' open court cases, to have the matter heard in chambers, by reason of procedural requirement. In as much as regulations are there to be adhered to, a court playing the balancing act maestro cannot but must tilt towards wisdom and justice when faced with such a situation.

THE WINDING UP ORDER FOUNDED ON MERIT

[17] At p 31 of the record of appeal is found the notes of proceedings which also recorded the reasons for her decision. A comprehensive scrutiny of the compiled records showed that the petition as supported by the verifying affidavit was in order and was not a point of contention by the appellant. That verifying affidavit is for the purpose of providing evidence of the truth of the statement in the petition and is necessary in all cases (*Re Koscot Interplanetary (UK) Ltd; Re Koscot AG* [1972] 3 All ER 829; *Re St David's Gold Mining Co* (1866) 14 LT 539). As regards this verifying affidavit, referred to as 'statutory affidavit' in England, the court in *Re Gold Hill Mines* (1882) 23 Ch D 210, Lindley LJ had said at p 214:

> The petition is presented by a person, who alleges that he is a creditor of the company, and in support of the petition there is the ordinary statutory affidavit, the object of prescribing which is to prevent the abuse of putting upon the file long affidavits in support of the petition which may turn out to be unnecessary. The statutory affidavit strictly is no proof of anything. It is hearsay as to almost everything alleged in it, *but it is sufficient to require an answer*. (Emphasis added.)

[18] In a gist, the verifying affidavit is prima facie evidence of the statements in the petition to which it relates, and unless there is evidence to the contrary the court can take the next step of deciding whether or not to make a winding up order (*Re New Callao Ltd* (1882) 47 LT 175; *Applications to Wind Up Companies* by Derek French). Even though, as observed by Megarry J in *Re Koscot Interplanetary (UK) Ltd*, evidence supplied in the verifying affidavit may be hearsay and still admissible, in the current appeal it cannot be labelled so, as the respondent who affirmed the verifying affidavit was involved with the preparation of the petition every step of the way. Further, a substantial portion of the statement of the petition relate to prior proceedings in the relevant courts, which eventually lead to this appeal and hence factual in nature. Unless there was evidence which could rebut the evidence adduced by the respondent

the appellant was in deep trouble. In *Re Travel & Holiday Clubs, Ltd* [1967] 2 All ER 606 the court had occasion to deal with an unopposed petition, as in this appeal, where the evidence involved were reports prepared by inspectors who were from a statutory fact finding body. Pennycuick J despite remarking that the reports were not mere hearsay had held that he could make a winding up order based on it, not as being evidence, but as being unchallenged material properly put before the court. I would not go as far as that. I would prefer to state that a court may hand down a winding up order only after having considered the available evidence in totality.

[19] Aside from the verifying affidavit a registrar's certificate issued pursuant to r 32 of the Companies Rules was also before the learned judge. This provision reads:

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> (1) After a petition has been presented, the petitioner or his solicitor shall on a day to be appointed by the Registrar attend before the Registrar and satisfy him that —
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> (a) the petition has been duly gazetted and advertised;
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> (b) the prescribed affidavit verifying the statements therein and the affidavit of service, if any, have been duly filed;
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> (c) the consent in writing of the approved liquidator nominated by the petitioner has been obtained and filed;
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> (d) the provisions of these Rules as to petitions have been duly complied with; ...

[20] Without that certificate, which certifies that the petitioner has fully complied with the above requirements, no order, save an order for the dismissal or adjournment of the petition, shall be made on that petition. In other words in the current appeal anything that was needed to be done had been done by the respondent. On the part of the appellant a nonchalant story unfolded in that there was no affidavit in opposition filed, as mandatorily demanded by r 30 of the Companies Rules 1972 (*Bank of Commerce (M) Berhad v Far-East United Industries Sdn Bhd* [2000] MLJU 431; [2000] 4 AMR 4694; *Delta Drive (M) Sdn Bhd v Hong Leong Finance Bhd* [2008] 4 MLJ 400; [2007] 4 CLJ 421). Rule 30 reads:

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> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[21] This provision mandatorily demands that if a petition to wind up a company has been presented, and it is to be opposed by the company, in this case the appellant, then an affidavit in opposition must be filed in court and served on the petitioner or his solicitor not less than seven days before the day fixed for hearing of the petition. As there was no affidavit in opposition, needless to say the need for any affidavit in reply to be filed by the respondent thus did not arise, as permitted by r 30(2) of the Companies Rules 1972. Without any opposition facing the petition, the learned judge was at liberty to assess the whole body of evidence, giving proper weight to them, and decide whether to grant the order or not.

[22] The above reasons apart, there was absolutely no valid reason why the order should not have been promptly meted down, in light also of the chequered history of this case. Prior to coming to this court, the matter already had visited the corridors of the Federal Court, when the appellant hotly contested the summary judgment obtained on 2 September 1998. This summarily obtained judgment sum was eventually affirmed by the country's apex court on 8 November 2006. The appellant did everything permitted by law to deprive the respondent of the judgment sum and now appears to be willing even to be wound up in order not to make payment. In the circumstances of the case any refusal of a winding up order by the learned judge would have been totally unacceptable.

[23] To recount some of the issues before us, the grouse of the appellant was not whether the papers of the petition were in order or not, but rather focused on procedural objections. After due prognosis of the antecedents as reflected above we found no merit in that complaint. As regards the merit of the petition, likewise, this panel found no error having been committed when the winding up order was handed down.

[24] Based on the above reasons we dismissed the appeal with costs. The comprehensive consequential orders have been detailed out above.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon